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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

DIAMOND CONSTRUCTION &
DESIGN,

Plaintiff and Respondent,

v.

FRANK PAN et al.,

Defendants and Appellants.

B253687

(Los Angeles County
Super. Ct. No. KC063455)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Salvatore T. Sirna, Judge. Affirmed.

Law Office of Jeanne Collachia, Jeanne Collachia for Defendants and Appellants.

Law Offices of Frank A. Satalino, Frank A. Satalino for Plaintiff and Respondent.

Defendants owned an industrial building that was destroyed in a fire. They hired plaintiff, a contractor, for demolition services. Following a bench trial, the trial court found that the parties expanded plaintiff's scope of services beyond what was listed in the parties' initial agreement, and that defendants wrongfully failed to pay plaintiff for any of its work.

On appeal, defendants argue that the trial court awarded excessive damages, and that plaintiff failed to establish it was a duly licensed contractor, which prohibited it from seeking compensation. The record on appeal does not include a reporter's transcript, which limits the scope of our review. Based on the limited record available, defendants fail to establish any trial court error. Accordingly, we affirm.

BACKGROUND

In March 2012, plaintiff Diamond Construction & Design (Diamond) brought suit against defendants Frank Pan and Ling Ling Ying. Diamond's complaint alleged that after defendants' industrial building was destroyed by fire, defendants hired Diamond to demolish the damaged structure and remove debris from the site. According to Diamond's complaint, defendants failed to pay for any of Diamond's work. Diamond sought nearly \$300,000 in damages under breach of contract, common counts, and related causes of action.

Statement of Decision

A three-day bench trial was held in July 2013. The trial was not reported. In August 2013, the trial court issued a proposed statement of decision, which later became its final statement of decision. The decision stated, in pertinent part, as follows:

The commercial property jointly owned by defendants (a married couple) was destroyed by fire in December 2011. Diamond is a licensed general contractor which specializes in demolition and construction. It is owned by Stelian Onufrei, who holds contractor licenses relevant to demolition work.

On December 16, 2011, Pan executed a "work authorization - contract" document prepared by Diamond that called for demolition of exterior walls at the premises and removal of debris that had fallen on a neighboring property. This document listed the

price of the work as “TBD.” Pan simultaneously executed a “contract/bid proposal” document also prepared by Diamond. It listed a price of \$7,520 for Diamond to “bring down existing vertical walls inside the existing building footprint [and] remove the wall and debris from next door property and deposit the debris inside the existing footprint area.”

On the same day that Pan executed the document, he spoke with Onufrei and requested that Diamond increase the scope of work to include removal of concrete walls, rebar, and other debris from the premises. Diamond began this work on December 18, 2011, and finished by January 13, 2012.

On January 17, 2012, Diamond sent to Pan three invoices totaling \$240,215. It later sent another invoice for an additional \$59,674. Pan never disputed in writing Diamond’s invoices. He refused to pay any amounts charged, however, claiming that the work done by Diamond exceeded the scope of their initial contract.

Onufrei testified that both he and his project manager spoke with Pan at the premises on numerous occasions, and that Pan approved the scope of Diamond’s work. In addition, Onufrei sent e-mails to Pan updating him on the progress of the work and charges incurred. Pan did not respond to the e-mails. At trial, Pan denied that, during the time Diamond worked on the premises, he was aware it was engaged in any work beyond what was listed in the original contract documents.

In its statement of decision, the trial court noted that it found Diamond’s witnesses—Onufrei and the project manager—to be credible and believable. It did not find Pan’s testimony persuasive or credible. The court believed that Pan was “intimately involved with and knowledgeable of the work” performed by Diamond.

The trial court awarded Diamond a total of \$247,864 in damages, based on what it determined was a reasonable value of the work provided by Diamond. In so deciding, the court found that Diamond was duly licensed at all times while providing work for defendants, except for a two-day period when Diamond’s license was suspended. The court found this brief suspension to be immaterial, and determined that Diamond substantially complied with licensing requirements.

Posttrial matters

Judgment in favor of Diamond and against Pan and Ying was entered on September 10, 2013. Defendants timely filed a motion for new trial, which was denied.

On January 2, 2014, defendants filed a notice of appeal from only the judgment. Thereafter, they brought a motion for a settled statement, which was denied.

DISCUSSION

Our review is constrained by the limited record available on appeal. The trial was unreported, so there is no reporter's transcript. When no error is apparent on the face of the appellate record, the judgment is "*conclusively presumed correct as to all evidentiary matters*. To put it another way, it is presumed that the unreported trial testimony would demonstrate the absence of error. [Citation.] The effect of this rule is that an appellant who attacks a judgment but supplies no reporter's transcript will be precluded from raising an argument as to the sufficiency of the evidence." (*Estate of Fain* (1999) 75 Cal.App.4th 973, 992; see also *Foust v. San Jose Construction Co., Inc.* (2011) 198 Cal.App.4th 181, 186 (*Foust*).)

Defendants could have mitigated the impact of a limited record by obtaining a settled statement. (*Foust, supra*, 198 Cal. pp.4th 181, 186.) Indeed, on appeal, defendants argue that the trial court's denial of their motion for settled statement constitutes reversible error. We lack jurisdiction to decide this issue, however, because defendants never appealed from the denial, which came well after their filing of the notice of appeal from the judgment. "The policy of liberally construing a notice of appeal in favor of its sufficiency (Cal. Rules of Court, rule 8.100(a)(2)) does not apply if the notice is so specific it cannot be read as reaching a judgment or order not mentioned at all." (*Filbin v. Fitzgerald* (2012) 211 Cal.App.4th 154, 173; see also *DeZerega v.*

Meggs (2000) 83 Cal.App.4th 28, 43 [separately appealable orders and judgments must be expressly specified in notices of appeal].)¹

I. No error in finding defendants liable for additional work

Defendants argue that the terms of their agreement with Diamond were limited by the written contract documents executed by Pan, and that any additional work would not be compensable.

Defendants contend that the parol evidence rule barred evidence that the written contract was modified. “[T]he parol evidence rule precludes extrinsic evidence of *prior* or *contemporaneous* agreements that contradict, vary, or add to an integrated writing—it does not relate to *future* agreements and does not bar extrinsic evidence that proves that the parties *subsequently* modified their *integrated* writing.” (*In re Ins. Installment Fee Cases* (2012) 211 Cal.App.4th 1395, 1413.) Reading the statement of decision in a manner favoring the judgment, we determine that the parties agreed to expand the scope of Diamond’s work after they entered into the original contract documents. Thus, the parol evidence rule would not apply.

Defendants also argue that any later oral modifications were prohibited by the language of the contract documents. The “work authorization - contract” document contained a provision relating to “change-orders,” stating, “Any changes from the ‘Scope of Work’ shall be made in writing and will be incorporated in the Contract.” Defendants further contend that modifications were precluded by Civil Code section 1698, which states, in pertinent part: “(a) A contract in writing may be modified by a contract in writing. [¶] (b) A contract in writing may be modified by an oral agreement to the extent that the oral agreement is executed by the parties. [¶] (c) Unless the contract otherwise expressly provides, a contract in writing may be modified by an oral agreement supported by new consideration.”

¹ In its respondent’s brief, Diamond argued that the denial of the motion for settled statement was not properly at issue in this appeal, a contention which defendants did not address in their reply brief.

Based on testimony and other evidence presented, the trial court found that Pan orally agreed to modify and expand the scope of work beyond what was identified in the initial contract documents. Under subdivision (b) of Civil Code section 1698, such an oral agreement was effective, to the extent it was executed. Diamond completed the additional work, and expended considerable effort and funds in doing so. Thus, the trial court was justified in finding that the oral modification was effective.

The written change order provision did not render any oral agreement unenforceable. Although courts generally uphold contractual provisions requiring that change orders be in writing, “[i]f the parties, by their conduct, clearly assent to a change or addition to the contractor’s required performance, a written ‘change order’ requirement may be waived.” (*Weeshoff Constr. Co. v. Los Angeles County Flood Control Dist.* (1979) 88 Cal.App.3d 579, 589, criticized on other ground in *Katsura v. City of San Buenaventura* (2007) 155 Cal.App.4th 104, 111.) The trial court found that Pan orally agreed to change the scope of Diamond’s performance. The court therefore was justified in finding that, despite the written change order provision, Diamond was entitled to compensation for the additional work.

Defendants also argue that, regardless of the scope of Diamond’s work, they never agreed to increase the contract price beyond the \$7,250 called for in the initial contract documents. In construction projects involving a great deal of changes, however, the terms of the original contract may be considered abandoned to allow recovery for the work performed. (*C. Norman Peterson Co. v. Container Corp. of America* (1985) 172 Cal.App.3d 628, 640-642 (*Peterson*).) In *Peterson*, the court found that the parties implicitly agreed to proceed with a project on a quantum meruit basis, and therefore an award compensating a contractor for all costs it expended on the project was proper. (*Id.* at pp. 644-646.) Similarly, in *Opdyke & Butler v. Silver* (1952) 111 Cal.App.2d 912, 919 (*Opdyke*), the court found it would be unfair to permit a property owner to limit a contractor’s compensation to the initial contract’s maximum price provision, which the owner, by changing the scope of the project, had made inapplicable and unjust. The same analysis applies here.

Additionally, the scale of the price increase alone does not compel reversal. Diamond was awarded \$247,864 in damages even though the initial price was \$7,250. Defendants argue that they never agreed to pay Diamond over 30 times the original contract price. Defendants, though, provide no authority for the assertion that the trial court was limited to awarding only a certain percentage more than the initial price. Defendants point to a number of cases in which courts awarded more than the initial contract amount, but never more than 270 percent of the initial price. (See, e.g., *Peterson, supra*, 172 Cal.App.3d 628; *Opdyke, supra*, 111 Cal.App.2d 912; *D. L. Godbey & Sons Const. Co. v. Deane* (1952) 39 Cal.2d 429; *Bailey v. Breetwor* (1962) 206 Cal.App.2d 287.) This comparison, however, is arbitrary and unpersuasive. For example, in *Peterson*, the initial contract price was not to exceed \$5,089,000, but the court found that the plaintiff was entitled to \$8,194,713.02 in compensation. (172 Cal.App.3d 628, 644-645.) While, percentagewise, this increased award was not as great as the one here, in monetary terms it was much larger. Just as we cannot say that the *Peterson* court erred by awarding over \$3 million more than what was initially agreed, defendants cannot credibly argue that the trial court erred by awarding more than a certain percentage of the initial price here.

In any event, the extent of Diamond's damages was primarily a factual issue for the trial court to determine. Diamond invoiced defendants in the amount of \$299,889, and Onufrei testified, based on his experience and knowledge, that these costs were reasonable and necessary. Defendants, meanwhile, submitted no expert testimony regarding the reasonable value of labor or services provided by Diamond, and the trial court did not find credible Pan's testimony estimating the value of Diamond's work at \$35,000. The court found it was "clear . . . that Plaintiff Diamond did substantial work at the premises." Nevertheless, it did not award all claimed damages, but instead awarded \$247,864, based on what it considered to be a reasonable value of the work.² This

² Defendants argue that a portion of the costs went to compensate an unlicensed subcontractor working on the project, and because this subcontractor did not have a valid

determination was based on the evidence presented and the credibility of the witnesses. We have no reason to second-guess the trial court's conclusions.

II. No error in finding Diamond was duly licensed

Defendants next contend that Diamond failed to establish that it was duly licensed while performing work for defendants because it did not demonstrate that it properly held workers' compensation insurance coverage.

The Contractors' State License Law (CSLL; Bus. & Prof. Code, § 7000 et seq.) imposes strict penalties for the performance of unlicensed contracting work. "Among other things, the CSLL states a general rule that, regardless of the merits of the claim, a contractor may not maintain any action, legal or equitable, to recover compensation for 'the performance of any act or contract' unless he or she was duly licensed '*at all times during the performance of that act or contract.*' ([Bus. & Prof. Code,] § 7031 [], italics added.)" (*MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co., Inc.* (2005) 36 Cal.4th 412, 418.)

It is undisputed that Diamond held contractor's licenses while working on the project.³ It has been found, however, that failure to keep adequate workers' compensation insurance can result in an automatic suspension of a license. (See *Wright v. Issak* (2007) 149 Cal.App.4th 1116 (*Wright*).) Business and Professions Code section 7125.2 provides, in part: "The failure of a licensee to obtain or maintain workers' compensation insurance coverage . . . shall result in the automatic suspension of the license by operation of law [¶] (a) The license suspension imposed by this section is effective upon the earlier of either of the following: (1) On the date that the relevant workers' compensation insurance coverage lapses. [¶] (2) On the date that workers'

license, it could not properly charge for its work. The record fails to disclose, however, what kind of work this subcontractor performed, or whether it was a type of work requiring a contractor's license. We therefore have no basis to reverse the award of damages relating to these costs.

³ Defendants do not contend the trial court erred in finding immaterial the brief two-day lapse in Diamond's license.

compensation coverage is required to be obtained.” *Wright* explained that, under Business and Professions Code section 7125.2, “a contractor’s license is automatically suspended as of the date the contractor was required to obtain workers’ compensation insurance but did not.” (149 Cal.App.4th at p. 1121.)

In *Wright*, the plaintiff contractor had a pattern and practice of severely underreporting its payroll to the State Compensation Insurance Fund. (149 Cal.App.4th 1116, 1119.) In one 10-month period, the contractor had an actual payroll of \$135,000, but reported a payroll of \$312. (*Ibid.*) The court found that, due to this underreporting, the contractor did not obtain workers’ compensation insurance, resulting in an automatic suspension of its contractor’s license. (*Id.* at pp. 1121-1122.)

Defendants assert that *Wright*’s holding applies here. They argue that Diamond failed to prove, and could not prove, it had a valid workers’ compensation insurance policy because, like the plaintiff in *Wright*, Diamond underreported its payroll.

Defendants are hamstrung by the lack of an adequate appellate record. In its statement of decision, the trial court found that Diamond was duly licensed at the time of the project. The statement of decision did not reference the status of Diamond’s workers’ compensation insurance policy. We must presume, therefore, that Diamond presented evidence adequate to show that it properly maintained workers’ compensation insurance, and was thus duly licensed. (See *Construction Financial v. Perlite Plastering Co.* (1997) 53 Cal.App.4th 170, 179 [“When an appeal is submitted on a record of this kind, the reviewing court *conclusively* presumes the evidence was ample to sustain the trial court’s factual findings.”].)⁴

Defendants claim that they submitted evidence at trial showing that Diamond underreported its payroll. This evidence, however, was not admitted by the trial court,

⁴ In its respondent’s brief, Diamond claims that Onufrei testified that Diamond had proper workers’ compensation insurance. Further, a “Certification of Records” from the Contractors State License Board, which is in the record, stated that Diamond was licensed during nearly all of the project period, and had “a Certificate of Workers’ Compensation Insurance in effect 02/01/11, on file.”

and defendants do not argue that this exclusion was improper. In any event, an underreporting of payroll does not necessarily result in an automatic suspension of a contractor's license. (*Loranger v. Jones* (2010) 184 Cal.App.4th 847, 857.) To even consider the possibility that Diamond's license was automatically suspended, we would need evidence that Diamond engaged in the sort of chronic, drastic underreporting present in *Wright*. *Loranger* stated, "the limited facts before the court strongly suggest the contractor [in *Wright*] did not have and never had a policy of workers' compensation insurance, that he intentionally underreported the wages he was paying (reporting zero or next to zero payroll), and that he did so to be excluded from the requirement of obtaining such insurance." (*Loranger*, at p. 857, citing *Wright, supra*, 149 Cal.App.4th 1116, 1119.) This type of evidence prevalent in *Wright* does not appear in the record here.

III. The new trial motion was properly denied

Defendants further contend that the trial court erred by denying defendants' motion for new trial. In their motion, defendants sought to introduce business records relating to Diamond's allegedly inadequate workers' compensation insurance.

Defendants moved for new trial on the basis that they discovered new evidence showing that Diamond underreported its payroll. The motion attached a declaration from a custodian of records authenticating the insurance records.

A new trial may be ordered on the basis of newly discovered evidence, but only if the evidence is material, and only if the moving party could not, "with reasonable diligence, have discovered and produced [the evidence] at trial." (Code Civ. Proc., § 657, subd. 4.) As noted by the trial court in its order denying the motion for new trial, Pan conceded that he had the supposedly newly discovered insurance records in his possession prior to trial. Furthermore, Pan made no showing that he could not, with reasonable diligence, have obtained a declaration from the custodian of records before trial. Thus, the trial court properly denied the new trial motion.

DISPOSITION

The judgment is affirmed.

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BOREN, P.J.

We concur:

ASHMANN-GERST, J.

CHAVEZ, J.